In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1097

GENE HICKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 8-10; II R. 293-296) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1969 (Pet. App. 11; II R. 297). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Black until February 28, 1969, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the course of his charge to the jury, the trial judge improperly commented on the evidence.

STATEMENT

Indicted and tried in the United States District Court for the Middle District of Georgia, petitioner was convicted on three counts of using the mails in a scheme to defraud, in violation of 18 U.S.C. 1341 (I R. 1-5). On November 3, 1967, he was sentenced to concurrent terms of a year-and-a-day (I R. 283-284). On appeal the convictions were affirmed (Pet. App. 8-10; I R. 284; II R. 297).

Government testimony showed a scheme under which petitioner, operating under variations of the name Taylor Topper,[1] placed newspaper advertisements for hairpieces for bald men, contacted the customers after they had responded through the mails to the advertisements, and obtained money or checks as deposits from the customers. Although he left forwarding addresses and promised delivery of the hairpieces, he would then fail to deliver them. Customers who had paid deposits received neither the hairpieces

---

[1] Petitioner formerly worked for Taylor Topper Inc. of New York (I R. 190). He told some customers that he was obtaining his hairpieces from Taylor Topper Company of California. The vice-president of that company denied that petitioner was authorized to work for his company (I R. 15-16, 76-77, 99, 101-102).

nor a refund of their money (I R. 14, 16-17, 19, 26, 47-48, 65, 70).

Petitioner introduced the testimony of two elderly men who said they had received their hairpieces and were satisfied with them (I R. 150, 153, 158-159). Petitioner testified that when he was arrested he had a hairpiece ready for delivery to one Hancock (I R. 220-221). Hancock testified, however, that this hairpiece, which was introduced into evidence at trial, did not match the color of his hair (I R. 263).

In the final instructions to the jury, the court stated that the indictment contained the charges against petitioner, and continued (I R. 269-270):

> * * * And they are, essentially, that he devised a scheme and an artifice to defraud some people by making false representations to them and by taking orders for hairpieces and taking money along with the orders and with never intending to deliver those hairpieces.
>
> In essence that is the charge. It is very much like plain old state charges of cheating and swindling, getting something for nothing.
>
> That is what the Government accuses him of doing.
>
> And then they go further and say that he caused the mails to be used in furtherance of that scheme and artifice. Well, there is no serious dispute here, if any at all, that he caused the mails to be used. * * *

Petitioner objected to the analogy to the state offenses of cheating and swindling on the ground that there was evidence of activities in Florida, Tennessee, and Georgia and that it was not known what the law was in those states (I R. 280-281).

Also, after referring to petitioner's evidence of good faith as a complete defense, the court instructed (I R. 276-277):

> Then Mr. Hancock. Now you saw these witnesses on the stand. You saw Mr. Hancock. You saw the color of his hair. You see this hairpiece which the defendant says he ordered specially for Mr. Hancock's head. You see the color of this hairpiece. You saw the color of Mr. Hancock's hair. Mr. Hancock says that's not the color of my head, Mr. Hickman [petitioner] said yes it is, yes it is. Those are circumstances in this case for you to consider. The wig will go with you to your room. Mr. Hancock will not. He was not offered in evidence. The wig was.
>
> Now if you find that this hairpiece was ordered by Mr. Hickman for Mr. Hancock that is a circumstance in favor of Mr. Hickman in this case. If you find that hairpiece on the desk there was ordered by Mr. Hickman, as Mr. Hickman says it was, for Mr. Hancock's head, that is a circumstance in favor of Mr. Hickman in the case. If you find it was not that is a circumstance against Mr. Hickman in this case.
>
> I am expressing no opinion one way or the other. There are twelve of you who will go to the room. I say if that is not a hairpiece which was ordered especially by Mr. Hickman for Mr. Hancock, that will be a circumstance against the defendant in this case, because the law says that when a person is charged with crime and offers an explanation, if that explanation is proved to be false that is a circumstance to be considered in the case, along with all the other evidence, because ordinarily a person charged with crime if

> he is innocent, does not find it necessary to prevaricate or fabricate in order to offer an explanation.
>
> I make it plain again, I don't know. I express no opinion as to this hairpiece. You jurors will pass upon that question.

Petitioner objected to this charge as "unduly commenting upon the evidence" (I R. 281).

ARGUMENT

The court's charge must be read in its entirety. *Boyd* v. *United States*, 271 U.S. 104; *United States* v. *Gainey*, 380 U.S. 63; *Temple* v. *United States*, 330 F. 2d 724, 725 (C.A. 5), certiorari denied, 379 U.S. 831. While it is questionable whether in *any* setting the challenged observations of the trial judge could be considered unfair or misleading, in the present case, in context, they were completely unexceptionable.

The reference to state offenses of swindling and cheating fell well within the judge's responsibility for clarifying the nature of crimes charged in the indictment. He quite properly explained that the essence of the mail fraud with which petitioner was charged resembled the deceitful activities customarily thought of as within state jurisdiction. The additional circumstance bringing the allegations into federal court was the use of the mails, a circumstance which was not seriously disputed. The court in no way intimated that petitioner was being tried on any state court charges of cheating and swindling, but only that the disputed elements were analogous to such offenses.

The court's remarks about the Hancock hairpiece were clearly innocuous and scrupulously fair to both sides. The trial judge merely summarized the competing claims made by the prosecution and the defense and explained the inferences that could be drawn if one side or the other were believed. Even though a federal judge may comment on the evidence, *Quercia* v. *United States*, 289 U.S. 466, 469, the judge in this case distinctly and carefully stated that he was expressing *no* opinion on the facts either way. His impartial explanation of the theories of the case was poles apart from undue intrusion on the jury's function.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

MARCH 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 336936 561